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NO. 83-1716

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

NEWPARK SHIPBUILDING & REPAIR, INC., ET AL.,
Petitioners

v.

JAMES P. ROUNTREE, ET AL.,
Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF TO THE MEMORANDUM FOR THE FEDERAL RESPONDENT

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To The Honorable Judges Of Said Court:

Some of the statements and contentions made by the Federal Respondent in its Memorandum in Opposition are at least grossly inaccurate if not blatantly false and the Court needs to be aware of them.

I.

The Federal Respondent asserts the *Gillespie* practical rule of finality should not be applied in this case because

the Benefits Review Board's decision ". . . finally determines no issues, dismisses no parties, and has no immediate consequences. It is not a Final Order." (Federal Respondent's Memorandum, hereafter R. Mem., p. 5).

A.

The assertion that the Board decision "finally determines no issues" is not just grossly inaccurate but is in fact blatantly false. The Board decision categorically finally resolves the 10(b) or 10(c) legal issue and affirmatively directs the Administrative Law Judge to use Section 10(c) and to do nothing more than fix the dollar amount of his average weekly wage.

> On remand, the administrative law judge must determine the reasonable value of claimant's services when self-employed by considering the cost of hiring another welder of skill and experience comparable to claimant or by using any other rational means. The administrative law judge may open the record to take additional evidence as is necessary. (Petitioner's Appendix, hereafter Pet. App., pp. A-71 - A-72.)

It does not direct and does not permit the ALJ to reconsider or redetermine the 10(b) or 10(c) legal issue. No one, not even the Federal Respondent, has ever contended that we start all over before the ALJ on this legal issue.[1]

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1. We assume the Solicitor General's lack of familiarity with the Longshoremen's Act is responsible for his confusion exemplified in footnote 3 (R. Mem. p. 5). In footnote 3 he obviously confuses the Board's comments on what additional evidence the ALJ may take or consider in fixing a dollar amount, as an implied authorization to the ALJ to reconsider the 10(b) or 10(c) legal issue. Nothing could be further from the truth.

The Compensation Order entered by the ALJ ordered Petitioners to pay Claimant/Respondent Rountree compensation for temporary total disability as long as it continued.[2]

The Board's decision categorically ordered the Petitioners to continue such benefits as awarded by the ALJ while the case was on remand to the ALJ.

> In the instant case, *the employer must continue paying temporary total disability benefits until a further order is issue. Should employer unilaterally terminate compensation, claimant can seek appropriate relief.* (Emphasis supplied) (Pet. App. p. A-72).

B.

The Federal Respondent contends the failure to obey this Order of the Board would have had no "immediate consequences" for Petitioners. The consequences to Petitioners in fact could have been several:

1. The imposition of a 20% penalty under Section 14(f) [33 U.S.C.A. § 914(f)] for each dollar of

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2. 1. For "temporary disability from April 22, 1975 to August 21, 1975 and from March 28, 1978 to the present time *and continuing throughout the continuance of such disability or until such time as a new compensation order is obtained* . . . based upon an average weekly wage of $360.41. . . ." (Emphasis supplied, Pet. App., pp. A-117 - A-118).
   2. For "temporary partial disability from August 22, 1975 to March 27, 1978 . . . during which he sustained a loss of wage-earning capacity . . . based upon an average weekly wage of $360.41. . . ." (Pet. App., p. A-118).
   3. ". . . six percent interest per annum on each past due installment . . . until paid . . . with Respondent to be credited with all amounts of compensation previously paid. . . ." (Pet. App. p. A-118).

compensation it failed to pay under such an Order within ten days of its being due.

2. Proceedings to enforce payment of the weekly compensation and 20% penalty ultimately in a United States District Court under Section 21(d) [33 U.S.C.A. § 921(d)].

3. Citation by the Board to show cause why they shall not be held in contempt for failing to obey the Board's Order.

4. A proceeding under Section 32(b) [33 U.S.C.A. § 932(b)] of the Act in which the insurance carrier could have had its right to write insurance under the Longshoremen's Act cancelled for failing to obey the Board's Order.

Substantial and detrimental consequences for Petitioners? Obviously so! But for these consequences, Petitioners would have had no reason to seek immediate review of the administratively final decision on the 10(b) or 10(c) legal issue until the dollar amount had been fixed on remand, as they would not have been paying any weekly compensation to the Claimant/Respondent Rountree. This was no ordinary order to remand, where the entire Order of the ALJ is set aside and no compensation is required to be paid. It is this unique aspect of the remand order and the finality of the decision on the 10(b) or 10(c) legal issue which compels the application of the *Gillespie* rule of practical finality to this case.

II.

The Federal Respondent also contends that "the worker will be denied his right to . . . compensation during the pendency of the appeal", if the Petitioners are allowed to pursue an appeal based upon the practical finality rule.

(R. Mem. p. 8). As illustrated by *Strachan Shipping Co. v. Davis,* 571 F.2d 968 (5th Cir. 1978), discussed at length in the Petition for Certiorari, pp. 15-22, the technical rule of finality does not always result in a sure and prompt payment of compensation benefits. In *Strachan,* the employer and carrier refused to pay compensation, even though an Administrative Law Judge awarded approximately $60,000.00 in compensation benefits after the original appeal to the Court of Appeals was dismissed for a technical lack of a final Order. (Petition for Certiorari, p. 18). In fact, the claimant was forced to institute enforcement proceedings pursuant to Section 18(a), 33 U.S.C.A. § 918(a) of the Act, seeking payment of the compensation award while the employer's second appeal to the Court of Appeals was pending, which was unsuccessful. Four years after the first Order of the Administrative Law Judge, the Court of Appeals for the Fifth Circuit dismissed the claim as time barred. 571 F.2d 968, at 975. Throughout the four years that the matter was pending before the Board and the Fifth Circuit, the claimant never received a penny in compensation benefits. Thus, the result of the technical rule of finality can and does result in the failure of a claimant to receive compensation while his case is on remand or being reappealed to the Circuit Court.

A comparison of the effect of the technical approach to appealability, as illustrated by the *Strachan* decision, with the practical finality rule, established by *Gillespie* and urged by Petitioners, demonstrates that an employee is assured of obtaining properly owed benefits in the quickest possible manner when the practical finality rule is applied even at this late date.

The Practical Approach of Gillespie	*The Technical Approach of Strachan*
1. The case is remanded to the Court of Appeals to reinstate the Panel decision, 698 F.2d 743.	1. The Petition for Certiorari is denied.
2. The Court of Appeals remands to the ALJ to fix the dollar amount of Rountree's average weekly wages under 10(b). [Or under 10(c) if this had been the Court of Appeals' holding.]	2. The Court of Appeals issues its mandate to the Board.
3. The ALJ fixes the average weekly wages under 10 (b). [Or under 10(c) if this had been the Court of Appeals' holding.]	3. The Board remands the case to the ALJ.[3]
4. Either Rountree or Petitioners *may* appeal to the Board and to the Court of Appeals only if they believe the dollar amount fixed under 10(b) [or 10(c) if this had been the Court of Appeals' holding] is not supported by the evidence.	4. The ALJ fixes the average weekly wage under 10 (c) as instructed by the Board.
	5. The Petitioners appeal to the Board and to the Court of Appeals on the 10(b) or 10(c) legal issue.

3. Petitioners' attempts to get the Board to remand the case to the ALJ for determination of the dollar amount of claimant's average weekly wages while their Petition for Certiorari is pending have been unsuccessful.

6. If Petitioners prevail again in the Court of Appeals and 10(b) is again held applicable, the case is again remanded to the ALJ to fix the dollar amount, but this time under 10(b).

7. The ALJ fixes the average weekly wage under 10 (b).

8. Either Rountree or Petitioners *may* appeal to the Board and the Court of Appeals only if they believe the dollar amount fixed under 10(b) is not supported by the evidence.

The technical rule thus (1) rewards an employer and carrier who decline to pay an award of compensation from an ALJ or the Board by delaying their day of reckoning even further, (2) penalizes claimants by delaying their receipt of compensation benefits, and (3) penalizes employees and carriers like Petitioners who fully comply with all such administrative orders at substantial cost to themselves while they seek resolution of a purely legal issue already fully decided administratively. There is no place for such a technical rule in cases like this one under the Longshoremen's Act.

III.

The Federal Respondent states that the Courts of Appeal have uniformly held that a Board Order deciding certain issues but remanding to the ALJ for further findings is not a final, appealable Order. (R. Mem., p. 6). What the Federal Respondent ignores is that none of

the cases cited contained orders which could meet the *Gillespie* practical rule of finality.

A.

In *Director O.W.C.P. v. Brodka,* 643 F.2d 159 (3d Cir. 1981), the Board remanded to ALJ to determine whether special second injury fund was liable to employee and to determine the nature or extent of his disability. The *Gillespie* rule could not apply because there were two substantial legal issues which the ALJ had to decide on remand.

B.

In *National Steel & Shipbuilding Co. v. Director, O.W.C.P.,* 626 F.2d 106 (9th Cir. 1980), the Board affirmed an ALJ's award for permanent and temporary total disability but reversed and remanded the award for lack of proper notice of one of the issues to the parties. Obviously, until that issue had been tried after proper notice, no final order could be enforced.

C.

In *Newport News Shipbuilding & Dry Dock Company v. Director, O.W.C.P.,* 590 F.2d 1267 (4th Cir. 1978), the BRB remanded to the ALJ to determine the degree of the employee's hearing loss and the compensation payable therefor. No final Order, in a practical sense, had been entered, with the degree of hearing loss undecided.

IV.

The Federal Respondent submits that there is no conflict between the Fifth Circuit's en banc opinion in this

matter and the Eighth Circuit's opinion in *St. Louis Shipbuilding & Steel Co. v. Casteel,* 583 F.2d 876 (8th Cir. 1978), as the ALJ in *Casteel* had issued his final Order fixing the amount of compensation after the Petition for Review had been filed in the Court of Appeals. (R. Mem. pp. 6-7) The fact that the ALJ in the *Casteel* decision may have taken further action on the remand does not permit a conclusion that the Eighth Circuit's action was taken on a technically final and appealable Order of the Board. To the contrary, it is clear that the Eighth Circuit went forward with its decision without the Board having considered any appeal from the ALJ's further Order on remand. Until the Board had considered the ALJ's Order following remand, there was no technically final Order from the Board for the Eighth Circuit to review. Thus, the Eighth Circuit, by considering the appeal when a remand had been ordered, obviously applied the practical rule of finality. In addition, the Eighth Circuit was apparently unaware of the ALJ's further action on the claim, as the decision does not mention any new order from the ALJ on remand.

If the technical rule of finality espoused by the Solicitor General herein had been followed in *Casteel,* the appeal should have been dismissed, requiring the widow to process her claim through the remand, again on appeal to the Board, and, finally, back to the Court of Appeals. The Eighth Circuit recognized this was a useless exercise by its practical approach of resolving the controlling legal issue at that time. The conflict between the practical rule of the Eighth Circuit in *Casteel* and the technical rule of the Court below is clear and certiorari should be granted to resolve this conflict.[4]

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4. See full discussion of *Casteel* case in the Petition for Certiorari, at pp. 23-25.

V.

Petitioners call the Court's attention to the fact that the Federal Respondent has tacitly acknowledged the validity of Reason for Granting the Writ No. 5 by not addressing it. It could not because the conflict between this Court's decisions cited in Reason No. 5 (Pet. for Cert. pp. 25-27) and that of the Court below in this case is not open to any question.

CONCLUSION

Petitioners respectfully submit that this Court's practical approach to finality, as mandated in *Gillespie* and as reaffirmed in *Alvez*, is the only reasonable and just approach to this case.

The Petitioners reiterate that their Petition should be granted, and this case summarily disposed of without oral argument with the simple notation: "Reversed. *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964)." Such an Order would reinstate the original decision of the Panel of the Court below (698 F.2d 743), in which the Section 10(b) or 10(c) legal issue has already been decided, and end this litigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing Reply Brief have been served upon each of the parties required to be served by depositing them in the United States Post Office, with first class postage prepaid, addressed to counsel of record and the Solicitor General of the United States at their Post Office address as follows: Mr. Stephen M. Vaughan, Mandell & Wright, 806 Main Street, Houston, Texas 77002, attorney for Respondent Rountree; to Mr. Francis X. Lilly, Mr. Donald S. Schire, and Mr. Joshua T. Gillelan, II, U. S. Department of Labor, 200 Constitution Avenue N.W., Suite N-2620, Washington, D.C. 20210, attorneys for the Respondent Director; and to Mr. Rex E. Lee, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, on this 12 day of July, 1984.

E. D. VICKERY